PUBLIC PROSECUTOR

v.

ABDUL MAJID MANAP & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL APPEAL NOS. 41-159-89, 41-154-89, 41-155-89]
29 MAY 1991

CRIMINAL PROCEDURE: *Whether Magistrate erred in law - Accused called to make defence - Failure of prosecution to call witnesses - Earlier offered to defence - Recalling complainant - Serious gap in prosecution case.*

The two respondents R1 and R2 who were police officers, were charged under s. 323 of the Penal Code with causing hurt to one CKM at the Police Central Station, Johor Bahru. The first respondent was acquitted whilst the second respondent was found guilty and fined RM1,000 in default 3 months jail. The public prosecutor appealed against the acquittal of the first respondent. The second respondent appealed against his conviction and sentence. The public prosecutor cross-appealed against the second respondent on the inadequacy of sentence.

In their submissions, the respondents said that the Magistrate had erred firstly in calling upon them to make their defence when the prosecution failed to call the investigating officer (IO) to testify although the IO was offered as a witness to the defence and secondly in not permitting the Counsel for R1 and R2 to recall the complainant, PW1, although the Court had been informed earlier by the said defence Counsel that he reserved his right to do so, depending on whether the IO of this case would be called.

Held:

[1] Having brought to Court all the witnesses from whom statements had been taken, the prosecution is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile.

[2] The existence of witnesses brought to Court but not called or offered for cross-examination must be brought to the attention of the Court so that they may be called by the defence or by the Court, should the Court consider it necessary.

[3] The question is not whether there was a failure to call or not to call the investigating officer but whether the failure to call a particular witness gives rise to a serious gap in the prosecution's case.

[4] In this case, the prosecution's evidence falls short of proving a *prima facie* case by its failure to call the investigating officer, whose evidence was very material as it involved 2 police officers ranked as Inspectors of Police; the IO in the course of his investigation, would have obtained relevant information some of which could and should be revealed during cross-examination.

[5] As defence Counsel had never applied to recall PW1 the second submission of the respondents fails.

[Appeal against the acquittal of R1 dismissed; appeal by R2 against his conviction and sentence allowed.]

Cases referred to:
Abdullah Zawawi v. PP [1985] CLJ (Rep) 19
Teh Lee Tong v. Rex [1956] 22 MLJ 195
Teoh Hoe Chye v. PP [1987] CLJ (Rep) 386

Legislation referred to:
Penal Code, s. 323

For the Deputy Public Prosecutor - Tan Poh Lai, DPP
For the 1st and 2nd accused - Elias Majid

JUDGMENT

James Foong JC:

These 3 criminal appeals were heard together since the facts therein are similar.

In all these 3 appeals, 2 persons by the name of:

(a) Abdul Majid bin Manap (the respondent in Appeal No. 41-159-89) (hereinafter referred to as the 1st accused) and,

(b) Jamal bin Limat (the appellant in Appeal No. 41-154-89 and the respondent in a cross Appeal No. 41-155-89) (hereinafter referred to as the 2nd accused,

were charged as follows:

> Bahawa kamu bersama pada 2 September 1984 jam lebih kurang 12.40 a.m. di Balai Polis Central, Johor Bahru di dalam Daerah Johor Bahru di dalam Negeri Johor dengan sengaja telah menyebabkan cedera kepada Chua Kang Meng No. k/p. 3436105, dengan ini kamu telah melakukan kesalahan yang boleh dihukum di bawah s. 323 Kanun Keseksaan.

The 1st and 2nd accused are police officers and at the material time one of them was attached to the Balai Police Central, Johor Bahru. The facts of the case are that on 2 September 1984 at about 12.30 a.m., a complainant by the name of Chua Kang Meng (PW1) was taken by the 2nd accused to the office of the 1st accused at Balai Polis Central, Johor Bahru. There, PW1 alleged that he was assaulted by 1st and 2nd accused thus leading to the 1st and 2nd accused being charged for the offence aforesaid.

PW1 testified that he was taken to the Balai Polis Central, Johor Bahru together with his friend Tan Soo Kee (PW3). PW1 alone was taken upstairs by 2nd accused to the 1st accused's office followed by about 3 other police personnel. Upon arrival at the office of the 1st accused, the 2nd accused assaulted PW1. The 2nd accused then left the said office while PW1 and the 1st accused remained therein. While still in the said office, PW1 alleged that the 1st accused slapped him twice on the face before he was asked to leave the police station with PW3.

PW3 noticed PW1 was bruised on the face when PW1 came downstairs in the police station. At home on the same evening, PW1 coughed out some sputum laced with blood.

The very same day, PW1 was examined by a doctor (PW2) at the General Hospital Johor Bahru and, some 5 days later by another doctor PW4. Both these doctors testified that PW1 suffered injuries such as cuts and bruises particularly on the left eye.

A police report was lodged by PW1 and this eventually led to both the accused being charged for the offence as stated aforesaid.

At the trial of both the accused at the Magistrate's Court at Johor Bahru, the learned Magistrate after hearing the four prosecution witnesses, called for the defence. At the close of the case for the defence, the 1st accused was acquitted while the 2nd accused was found guilty and was fined RM1,000 in default 3 months jail.

The Public Prosecutor now appeals against the acquittal of the 1st accused. This is in Criminal Appeal No. 41-159-89.

The 2nd accused now appeals against his conviction and sentence. This is in Criminal Appeal No. 41-154-89.

The Public Prosecutor brings a cross appeal against the inadequacy of sentence against the 2nd accused. This is in Criminal Appeal No. 41-155-89.

Mr. Elias Majid Counsel for both the 1st and 2nd accused relied mainly on 2 grounds in his appeal.

Firstly, the learned Magistrate has erred in calling upon the 1st and 2nd accused to make their defences when the prosecution failed or refused to call the investigating officer (IO) in this case to testify though the IO was offered as a witness to the defence.

Secondly, the learned Magistrate erred in not permitting the 1st and 2nd accused's Counsel to recall PW1 to be cross examined further, though the Court had been informed earlier by the said defence Counsel that he reserved his right to do so, pending on whether the IO of this case would be called.

In dealing with the first ground, the law relating to who and whom the prosecution should call as its witness to its case, are fairly well set out and discussed in our laws.

In the case of *Teh Lee Tong v. Rex* [1956] 22 MLJ 195, Spenser Wilkinson J even summarised a guideline whom the prosecution should call to prove its case.

The following are his summaries:

(1) All the witnesses from whom statements have been taken should be brought to the Court by the prosecution, except those where evidence will clearly and obviously throw no light on the case; any witness not so brought to Court must be made available to the accused, should he desire to call him.

(2) Having brought the witnesses to Court the prosecuting officer is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile.

(3) The existence of witnesses brought to Court but not called or offered for cross-examination under (2) above must be brought to the attention of the Court so that they are available to be called by the defence, or by the Court should the Court consider this necessary.

However, though these may be the guidelines, the cardinal principle in a criminal trial is still based on the golden rule that the prosecution must prove its case beyond reasonable doubt, against the accused person. Though it is established that the prosecution has the right not to call every witness from whom a police statement has been taken but, it has still to prove a *prima facie* case against the accused.

In *Abdullah Zawawi v. PP* [1985] CLJ (Rep) 19, the Supreme Court ruled that the prosecution must not fall short of proving a *prima facie* case at the end of its case by not calling sufficient relevant witnesses. If there are gaps in the prosecution case, then the prosecution must close it with sufficient evidence from prosecution witnesses.

This question of whether the IO must be called as a witness by the prosecution has been determined by the Supreme Court in the case of *Teoh Hoe Chye v. PP* [1987] CLJ (Rep) 386. In the judgment of Abdul Hamid CJ (Malaya) (as he then was), the following is the guiding principle:

> Fundamentally, the matter in issue is not whether there was a failure to call or not to call the investigating officer but whether the failure to call a particular witness gave rise to a serious gap in the prosecution case.

In this case, this Court finds that the allegations of PW1 against the 1st and 2nd accused had been challenged by the defence during the prosecution case. Further, there were evidence by PW1 himself that besides the 2nd accused, there were 3 other police officers who accompanied him upstairs into the 1st accused's office.

If the IO had been called it would have certainly shed light as to whether the 1st and 2nd accused were the only persons in the office. As there were 3 other officers who accompanied PW1 there are doubts raised as to whether it was only the 1st and 2nd accused who assaulted PW1.

An IO in almost all criminal cases is like an unbiased officer, appointed to investigate into a complaint by a complainant who made a police report. The IO while in the course of his investigation would have recorded statements from various persons involved with the case, checked various entries, statements and records, visited the scene of the crime and carried out other related activities all of which are to determine whether a crime has been committed. Such a person would have in his possession relevant information some of which could and should be revealed during cross-examination.

The prosecution alleged that the 3 other officers would not be identified and that the IO was not an important witness who could shed any light on this case.

This Court disagrees with this contention. Whether the IO can assist in establishing the truth in this case is only when he is called to testify and be cross examined. From the materials in his possession the investigation would certainly reveal which officer was on duty at the material time and, who were the officers who entered the office of the 1st accused and, whether there were other materials to justify PW1's complaint.

Though the 2 doctors did testify that PW1 was injured but the question is, 'Who injured him?'. PW3 was downstairs and as such could not shed any light except after the event.

The IO is very material in this case as it involves 2 police officers with the rank of Inspector of Police. Allegations such as those stated in this case should be thoroughly investigated and the investigation be made known within the legal limits during the prosecution case. By failing to do so, serious questions such as those stated above are left unanswered giving rise to a serious gap in the prosecution's case.

The learned deputy submitted to this Court that the IO was offered to the defence at the close of the prosecution case. It is well established and as stated in *Abdullah Zawawi v. PP* that

> it is not for the defence to call the offered witness or witnesses to supplement the prosecution case.

It is for the prosecution to prove its case. The defence has the right to establish reasonable doubts on the prosecution case during the case for the prosecution itself, so if no *prima facie* case is established, the accused will be acquitted and discharged without his defence being called. In this case the prosecution evidence falls short of proving a *prima facie* case by the failure to call the IO of this case.

As regards to the second contention raised by the defence Counsel, this Court finds that the learned Magistrate had not erred in disallowing the recalling of PW1 to testify. This is for reason, as stated by the learned Magistrate simply on the fact that the defence Counsel never applied to recall PW1.

On the grounds as stated aforesaid this Court:

(1) dismisses the appeal of the prosecution against the 1st accused in Criminal Appeal No. 41-159-89;

(2) allows the appeal of 2nd accused in Criminal Appeal No. 41-154-89;

(3) dismisses the cross appeal of the prosecutor against the 2nd accused in Criminal Appeal No. 41-155-89.

Also found at [1991] 2 CLJ 1592